No. 42524-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

JOHN J. HADALLER, an individual,

Appellant,

v.

DAVID A. & SHERRY L. LOWE; and RANDY FUCHS,

Respondents.

RESPONDENTS' BRIEF

APPEAL FROM LEWIS COUNTY SUPERIOR COURT CASE
NO. 11-2-00574-5, THE HONORABLE JUDGE JAMES W. LAWLER

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I. INTRODUCTION

Respondents David and Sherry Lowe ("the Lowes") and Randy Fuchs ("Fuchs") respectfully urge the Court to affirm the trial court's summary judgment rulings dismissing Appellant John J. Hadaller's claims and exercising its discretion to hear the case and award attorney's fees based on the frivolous character of Hadaller's claims. The Lowes and Fuchs further urge the Court to award them attorney's fees and costs on appeal on the same bases as awarded below, as provided for by RAP 18.1.

II. STATEMENT OF THE ISSUES

Hadaller assigns four errors to the trial court: (1) failing to recuse Judge Lawler from the case; (2) concluding that Hadaller's claims against the Lowes for misrepresentation and tortious interference of contractual relations is time barred by the three year statute of limitations; (3) finding no genuine issues of material fact supporting Hadaller's claim for tortious interference of contractual relations/misrepresentation, damages/specific performance; and (5) [sic] awarding attorney's fees under CR 11. There are several important and dispositive conclusions to be reached on review based solely on these assigned errors:

First, Hadaller does not assign error to the trial court's summary judgment in favor of Fuchs on all claims, namely, Hadaller's claims for misrepresentation, tortious interference, disparagement, slander of title and injurious falsehood and emotional distress. Indeed, Hadaller's brief is devoid of substantive assertions as to claims against Fuchs. As a result, the

trial court's decision on these claims is unchallenged and thus should be affirmed. Moreover, because the trial court's decision on these claims, including finding them frivolous, is unchallenged, Hadaller does not challenge the underlying justification for the award of attorney's fees under both CR 11 and RCW 4.84.185 based on these claims.

Second, Hadaller does not assign error to the trial court's summary judgment in favor of the Lowes on Hadaller's claim for intentional infliction of emotional distress. As a result, the trial court's decision on this claim is unchallenged and thus should be affirmed. Moreover, because the trial court's decision on this claim, including finding it frivolous, is unchallenged, Hadaller does not challenge the underlying justification for the award of attorney's fees under both CR 11 and RCW 4.84.185 based on this claim.

Third, while he had an opportunity to do so, Hadaller did not plead or allege fraud or intentional or negligent misrepresentation against the Lowes at the trial court and such claims were not part of the case below or considered or ruled on by the trial court. Accordingly, such claims are not before the Court of Appeals on review, and any factual assertions or arguments directed thereto should not be considered.

Accordingly, the Lowes and Fuchs disagree with Hadaller's statement of issues on appeal, and restate them as follows:

A. WHETHER GENUINE ISSUES OF MATERIAL FACT PRECLUDED SUMMARY JUDGMENT ON HADALLER'S TORTIOUS INTERFERENCE CLAIM AGAINST THE LOWE

1. Hadaller's Tortious Interference Claim against the Lowes is Time Barred

Are there genuine issues of material fact that should have precluded the trial court's ruling that Hadaller's claim against the Lowes for tortious interference with contractual relations is time barred by the three year statute of limitations where it is undisputed that to the extent any cause of action existed with respect to the Lowes' purchase of Segregation Lot 2, Hadaller was aware of it by no later than May 9, 2008 and Hadaller waited until May 12, 2011—more than three years later—to file his complaint against the Lowes?

2. Hadaller's Claim against the Lowes for Tortious Interference Fails to meet any of the Essential Elements

Are there genuine issues of material fact that should have precluded the trial court's ruling that Hadaller's claim against the Lowes for tortious interference with contractual relations fails where Hadaller fails to make out a *prima face* case on **each** of the five elements essential to his claim, the failure of any one of which justifies summary dismissal?

B. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION

1. Recusal of Judge Lawler

Did the trial court abuse its discretion in denying Hadaller's motion to recuse the Honorable Judge James W. Lawler where the trial court is presumed to perform its functions regularly and properly without

bias or prejudice, prejudice is not presumed, the trial court gave assurances of impartially, and Hadaller's claim of possible bias is purely speculative?

2. Award of Attorney's Fees under CR 11 Below

Did the trial court abuse its discretion in awarding attorney's fees pursuant to both CR 11 and RCW 4.84.185 where the trial court made specific findings that (a) Hadaller's pleadings are not well grounded in fact, not warranted by existing law, and were interposed for an improper purpose, namely, to harass and cause unnecessary litigation, as demonstrated by the objectively frivolous nature of Hadaller's claims as well as the multiple factual allegations made in his verified complaint that are directly contradicted by prior admissions by Hadaller and/or rulings by the Court; and (b) Hadaller's action was frivolous and advanced without reasonable cause?

C. AWARD OF ATTORNEY'S FEES ON APPEAL

Should the Lowes and Fuchs be awarded their attorney's fees and costs on appeal on the same bases as they were awarded attorney's fees and costs below?

III. STATEMENT OF THE CASE

The undisputed facts admitted by Hadaller or supported by evidence that cannot credibly be disputed and were relied upon by the trial court are set forth below. The Lowes and Fuchs note that the majority of Hadaller's factual allegations consist substantially of unsupported

assertions, *ad hominem* attacks on the Lowes and Fuchs and their counsel, and false and purely gratuitous characterizations—all of which are wholly irrelevant to the issues on appeal and should be disregarded.

A. FACTUAL BACKGROUND

Non-party trustees of the Fortman Trust dated November 14, 1991 (herein referred to as the "Fortman Trust") agreed to sell Lots 1 and 3 of Segregation Survey recorded September 17, 1991 under Auditor's File Number 9110392 to Hadaller in late 2001. The sales agreements were documented by separate Real Estate Purchase and Sale Agreements that had been prepared by agent Bob Kling. (CP 661, 665-698) In neither of these agreements is there any statement or provision that Segregation Lot 2 would be sold to Hadaller. In both of these agreements there is a specific provision (General Provision 21(c)) that states that there are no verbal agreements or understandings that modify the agreement. (CP 661-662)

Hadaller did not have the funds to purchase all three Segregation Lots 1-3. Accordingly, the Fortman Trust negotiated a sale of Lots 1 and 3 to Hadaller, and expected he would purchase Lot 2 in the future. But the Fortman Trust refused to agree to give Hadaller an option to purchase or a right of first refusal. (CP 662)

During the course of negotiations with Hadaller, the Fortman Trust told him that it would be willing to give Hadaller the opportunity to purchase Lot 2. However, at no time did the Fortman Trust ever sign any

document or otherwise agree that Hadaller would have an option to purchase or a right of first refusal. No such document has ever been presented by Hadaller nor did one ever exist, and Hadaller has admitted repeatedly that there was no written agreement. (CP 662)

Hadaller never indicated that he would rely on the Fortman Trust to provide him an opportunity to purchase Segregation Lot 2. In fact, the Fortman Trust gave Mr. Hadaller multiple opportunities to purchase Lot 2, but he was always either unable or unwilling to agree to pay the purchase price each time. The Fortman Trust gave Hadaller the opportunity to purchase Segregation Lot 2 in 2001 at the time he purchased Segregation Lots 1 and 3 and again in 2003-2004. (CP 662)

In early 2005, Fuchs purchased a lot in the Mayfield Cove Estates from Hadaller. Soon thereafter, he became aware that Hadaller was attempting to obtain "veto power" over the majority of Association by having existing members sign an "Amended Covenants" document. Fuchs emphatically told Hadaller that Fuchs would never agree to give any minority owner "veto power" over the majority, and refused to sign the "Amended Covenants." (CP 829)

Unbeknownst to Fuchs, his signature was nevertheless placed on the "Amended Covenants" document and recorded by Hadaller on August 28, 2006. Fuchs did not become aware that his signature had been forged with a date of November 6, 2005, or that Hadaller recorded the falsified "Amended Covenants" document, until spring of 2007. At that time Fuchs notified Hadaller and Lewis County that he disputed the

signature attributed to Fuchs as well as the validity of the "Amended Covenants" document. (CP 829-833)

Fuchs subsequently confirmed that he never signed the "Amended Covenants" documents under oath in Civil Action No. 09-2-52-1, a case brought by the Association against Hadaller where the validity of the "Amended Covenants" document was a central issue. Fuchs provided his testimony in declaration as well as during direct examination during the December 10-11, 2009 trial in that case. (CP 834, 837-840) Fuchs reiterated this testimony in response to a follow-up question from the Court during the same proceeding:

> Court: Your testimony, Mr. Fuchs, here today under oath is that the signature on the attachment to Exhibit 20 that purports to be your signature agreeing to the modification of the original C.C. & R.'s is a forgery and it's not your signature?
>
> Fuchs: Yes, I do.

(CP 841, ll. 19-24)

Based on this evidence and testimony the trial court in that case expressly found that the owners of affected lots disputed the validity and enforceability of their purported signature on the "Amended Covenants" document and none of them were properly attested. (CP 834, 843-865, Findings ¶ 17) The Court specifically concluded that the "Amended Covenants" document was invalid and unenforceable. (CP 834, 843-865, Conclusions ¶ 4) Accordingly, Hadaller knew of that Fuchs' refused to

sign the "Amended Covenants" documents no later than August 28, 2006. (CP 829-833; 866-869)

In 2006, soon after purchasing property in from Hadaller, Fuchs approached the Fortman Trust about purchasing Segregation Lot 2. The Fortman Trust again gave Hadaller an opportunity to purchase the property. When Hadaller could not come up with a superior offer to the one made by Fuchs, Hadaller filed a *lis pendens* against the property, then a lawsuit involving the property, and took every step he could to ruin the sale to Fuchs, at which he was ultimately successful. (CP 662)

Because of Hadaller's actions ruining the sale with Fuchs and suing the Fortman Trust, William Fortman, manager of the Fortman Trust, vowed never to sell Segregation Lot 2 to Hadaller. Mr. Fortman informed Hadaller of this in 2006 and since then every time Hadaller or anyone else has asked about the property the Fortman Trust has unequivocally stated that it would not sell Segregation Lot 2 to Hadaller. (CP 662-663)

David and Sherry Lowe purchased Lots 1-3 of Segregation Lot 3 in the Mayfield Cove Estates Homeowners Association from Hadaller in October 2007. They purchased the property as a vacation getaway with their five children from their home in Bellevue, Washington. (CP 473-474, 481-482, 656) In the months following the Lowes' purchase they visited the property, occasionally visiting with Hadaller and his girlfriend Deborah Reynolds. During this time the Lowes became peripherally aware that Hadaller was involved in litigation with some of his neighbors and the owner of Segregation Lot 2 (later learned to be the Fortman Trust), which

they knew to be a large piece of wooded property that adjoined some of the Lowes' lots and ran down to the lake. While the Lowes had limited awareness that Hadaller had some involvement in developing the lots of others in the area, they did not spend any significant time with Hadaller discussing the development or his plans for development of property in the area. (CP 474, 656-657) At this time the Lowes were not aware of any agreement or other arrangement between the Fortman Trust and Hadaller regarding any interest Hadaller may have had in purchasing Segregation Lot 2, or any right of first refusal, option or other agreement between the Fortman Trust and Hadaller. (CP 474, 657)

In or around April 2008, for the first time, Hadaller suggested to the Lowes that they consider purchasing Segregation Lot 2 from the Fortman Trust. Hadaller told the Lowes that he had hoped to purchase and develop the property, but that he had never been able to obtain it from the Fortman Trust because he had a falling out with Mr. Fortman and that Mr. Fortman had told him that he would never sell Hadaller the property. . Hadaller did not approach the Lowes about purchasing the property together, but rather suggested that if the Lowes purchased the property, because they were friendly with Hadaller, the Lowes could perhaps resolve the ongoing litigation among Hadaller, the Fortman Trust and others in the Association. (CP 474-475)

The Lowes became intrigued at the idea of purchasing Segregation Lot 2 for several reasons. It was a much larger piece of property than the three lots they had purchased from Hadaller earlier (6.32 acres versus

2.18 combined acres in the three lots). In addition, it had direct access to and a direct view of the lake. Because it abutted the lake, the Lowes understood that it would be eligible for a private dock permit from the City of Tacoma. Thus, it offered greater potential for vacation enjoyment as a retreat for the Lowes' family. (CP 475, 657)

For these reasons, the Lowes contacted Mr. Fortman on or about April 29, 2008 to inquire about the availability of Segregation Lot 2. They learned that it was available for $250,000. Based on the Lowes' discussion with Mr. Fortman and interest in the property they began the purchasing process that culminated very quickly in agreement for purchase dated May 6, 2008. The Lowes contacted Mr. Fortman's attorney Charles Althauser and worked with him to prepare and consummate the real estate purchase and sale contract. (CP 475-476)

Hadaller knew about the Lowes' intended purchase of Segregation Lot 2 from at least as early as May 1, 2008. On that day Hadaller emailed the Lowes a copy of a plat map showing the property. (CP 475-476, 483-485) The Lowes entered into the agreement to purchase Segregation Lot 2 from the Fortman Trust effective May 6, 2008 via a Residential Real Estate Purchase and Sale Agreement, which was signed May 7, 2008. (CP 476, 486-492)

As of that time, the Lowes had never learned from Hadaller or anyone else that Hadaller claimed to have a right of first refusal, option or any other agreement with the Fortman Trust to purchase Segregation Lot 2. The Lowes had no knowledge of or influence over whether

Mr. Fortman offered the property to anyone else, including Hadaller, at that time, and absolutely no influence on Mr. Fortman's decision to sell the property to the Lowes. (CP 476, 657, 663-664)

After the Lowes concluded the purchase of Segregation Lot 2, Hadaller approached them and demanded that they accept a proposal he had for him to acquire part of Segregation Lot 2 from the Lowes as the new owner. By email dated May 7, 2008, Hadaller sent the Lowes his "firm offer" to split the cost of developing the property. (CP 476, 493-496, 657) By responsive email to Hadaller the same day, the Lowes immediately refused to accept Hadaller's offer for multiple reasons, including (1) they had no desire at that time to develop the property; (2) they wanted to have ample opportunity to enjoy the property and consider what they wanted to do with it before agreeing to take any proposal; (3) Hadaller's "firm offer" was patently outrageous (after the Lowes purchased the property for $250,000, Hadaller wanted them to give him more than half of the property and pay him $100,000!); and (4) the Lowes were beginning to understand and appreciate Hadaller's questionable character. (CP 476, 497-499, 657)

The next day, by email dated May 8, 2008, Hadaller acknowledged that the Lowes were buying Segregation Lot 2 and that there was no agreement of any kind—or any "agreement to agree—between them regarding the property. Hadaller even attached to the email a copy of the *lis pendens* he had filed against Segregation Lot 2. (CP 477, 500-503, 657) Later that same day the Lowes sent Hadaller an email where they

specifically indicated that while they remained open to consider a development agreement with Hadaller in the future, there was no agreement at that time, or any promise that there would ever be any agreement. The Lowes also expressly confirmed to Hadaller that their purchase and sale agreement with the Fortman Trust was executed and finalized. As of this time Hadaller unequivocally knew (1) that the Lowes and Hadaller had no agreement or any "agreement to agree," and (2) that the Lowes had purchased Segregation Lot 2 from the Fortman Trust. (CP 477, 504-505, 658)

The following day, on May 9, 2008, Hadaller again expressly acknowledged that there was no agreement between him and the Lowes regarding Segregation Lot 2. In addition, Hadaller informed the Lowes of his intent to commence litigation against them related to Segregation Lot 2. (CP 477, 506-507, 658)

From the time of their purchase, the Lowes have worked diligently and at tremendous personal time and expense to confirm their ownership of and title to accessible Segregation Lot 2—to realize the investment they made in the property more than four years ago. The Lowes have relied on the fact that Hadaller knew about and never objected to their purchase of the property for more than three years after he knew of their purchase, notwithstanding Hadaller's many lawsuits against the Lowes related first to that property, then to other properties and issues in the area. To allow Hadaller to raise this claim now, after these many years and the Lowes'

reliance on their purchase not being at issue, would result in significant hardship and severe damage to the Lowes. (CP 477-478, 658)

The Lowes never entered in to ***any*** agreement—or any "agreement to agree"—with Hadaller regarding the purchase of Segregation Lot 2 from the Fortman Trust. The Lowes never influenced or otherwise had any impact on Mr. Fortman's decision on whom to offer the property to or ultimately to sell the property to the Lowes. Rather, they merely offered to purchase the property at a fair and mutually agreeable price. The Lowes' sole purpose and ultimate goal was to purchase the property; even if they had been aware of any agreement between Hadaller and the Fortman Trust, it would not have formed any basis for or significance to their decision to purchase. (CP 473-479, 656-660)

B. PROCEDURAL BACKGROUND

On May 13, 2011, Hadaller filed a complaint in the Lewis County Superior Court against the Lowes for tortious interference with contractual relations and intention infliction of emotional distress and against Fuchs for tortious interference with contractual relations, misrepresentation, specific performance, injurious falsehood/slander of title and intentional infliction of emotional distress. (CP 003-021) Many of the same factual allegations and claims were asserted against both the Lowes and Fuchs.

Almost immediately, on May 25, 2011, Hadaller filed a motion for a change of judge against the Honorable Judge Richard L. Brosey, which was granted. Hadaller also filed a motion for recusal of the Honorable

Judge James W. Lawler on the basis of prejudice under RCW 4.12.040, which was fully briefed, heard and denied by order dated July 1, 2011. (CP 022-071)

Hadaller served the complaint on the Lowes almost immediately. The Lowes answered and asserted counterclaims for CR 11 and frivolous action (RCW 4.84.185) violations on June 1, 2011. (CP 631-640) On June 14, 2011, the Lowes moved for summary judgment dismissing all of Hadaller's claims and granting the Lowes' claims and for sanctions, attorney's fees and costs against Hadaller. (CP 712-743, 473-629, 656-711, 744-796) The Lowes' summary judgment motion was heard and granted on July 29, 2011, and the Lowes were awarded the requested sanctions, attorney's fees and costs. (CP 218-220)

The following day, July 30, 2011, Hadaller served co-defendant Fuchs with the summons and complaint. Notwithstanding his belated service of the complaint on co-defendant Fuchs, on August 26, 2011, Hadaller filed the present premature notice of appeal of the summary judgment in favor of the Lowes. Hadaller appealed only the trial court's July 29, 2011 Order granting the Lowes summary judgment.

On September 9, 2011, Fuchs answered and asserted counterclaims for CR 11 and frivolous action (RCW 4.84.185) violations. (CP 797-806) On November 22, 2011, Fuchs moved for summary judgment dismissing all of Hadaller's claims and granting Fuchs' claims and for sanctions, attorney's fees and costs against Hadaller. (CP 807-955) Fuchs' summary judgment motion was heard and granted on December 23, 2011, and

Fuchs was awarded the requested sanctions, attorney's fees and costs. (CP 373-375)

Hadaller subsequently filed a motion for reconsideration of the Court's December 23, 2011 summary judgment order in favor of Fuchs and for leave to amend his complaint to add new claims based on breach of contract, which was fully briefed. (CP 376-463, 956-971) Hadaller's motion was heard and denied on January 5, 2012, and Fuchs was awarded attorney's fees pursuant to CR 11 based on the trial court's specific finding that Hadaller's motion was not well grounded in fact, not warranted by existing law and was not interposed for any proper purpose. (CP 464-466)

IV. AUTHORITY AND ARGUMENT

Of the four errors asserted by Hadaller, two are reviewed *de novo* on appeal, namely, the trial court's grant of summary judgment in favor of the Lowes on Hadaller's tortious interference claim, both on the basis of being time barred and his failure to meet any of the five essential elements. The remaining errors asserted by Hadaller call into question the trial court's discretion, namely, the issue of recusal of Judge Lawler and the award of attorney's fees under CR 11 and RCW 4.84.185.

A. HADALLER FAILS TO CREATE ANY GENUINE ISSUE OF MATERIAL FACT REGARDING HIS TORTIOUS INTERFERENCE CLAIM AGAINST THE LOWES

A motion for summary judgment is properly granted when there is no genuine issue as to any material fact, assuming facts in a light most

reasonable to the nonmoving party, and the moving party is entitled to a judgment as a matter of law. CR 56(c). *Sane Transit v. Sound Transit*, 151 Wn. 2d 60, 68, 85 P.3d 346 (2004). Where reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment should be granted. *LaMon v. Butler*, 112 Wn. 2d 193, 199, 770 P.2d 1027 (1989). Summary judgment is subject to a burden shifting scheme. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009). After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact. *Id.* In doing so, the nonmoving party "may not rely on speculation, [or] argumentative assertions that unresolved factual issues remain." *Id.* at 602.

Hadaller's tortious interference claim against the Lowes is properly dismissed on either of the two independent bases: the claim is time barred under the three year statute of limitations and Hadaller fails to create a genuine issue of material fact as to all five essential elements of the claim.

1. Hadaller's Tortious Interference Claim against the Lowes is Time Barred

The statute of limitations for tortious interference with contractual relations is three years. RCW 4.16.080(2); *City of Seattle v. Blume*, 134 Wn.2d 243, 251, 947 P.2d 223 (1997). The statute of limitations period commences and a cause of action accrues when a party has the right to seek relief in court. *First Maryland Leasecorp v. Rothstein*,

72 Wn. App. 278, 282, 864 P.2d 17 (1993). A plaintiff opposing a statute of limitations defense bears the burden of proving that the facts constituting the claim were not and could not have been discovered by due diligence within the applicable limitations period. *Clare v. Saberhagen Holdings, Inc.*, 129 Wn. App. 599, 603, 123 P.3d 465, *review denied*, 155 Wn.2d 1012 (2005). A claimant who knows of the harm and the immediate cause of the harm, but fails to make any meaningful inquiry, has breached the due diligence duty. *Id.* at 604. When reasonable minds could reach but one conclusion, application of the statute of limitations may be determined on summary judgment. *Id.* at 602.

The cause of action Hadaller asserts in this case is that the Lowes tortiously interfered with a contractual relationship Hadaller had with the Fortman Trust by the act of agreeing to purchase Segregation Lot 2. Hadaller knew about the Lowes' intention to and actual purchase of Segregation Lot 2 by no later than May 9, 2008, as confirmed by the following undisputed evidence:

- At least as early as April 2008, Hadaller told the Lowes that William Fortman, manager of the Fortman Trust, would never sell him the property, and suggested that the Lowes buy it. (CP 474-475)

- Hadaller actively encouraged the sale, as demonstrated by Hadaller's email to the Lowes of a copy of a plat map showing the property on May 1, 2008. (CP 475-476, 483-485)

- The Effective Date of the Residential Real Estate Purchase and Sale Agreement between the Lowes and the Fortman Trust was May 6, 2008. (CP 476, 486-492)

- By email dated May 7, 2008 from Hadaller to the Lowes, Hadaller admitted that the Lowes were purchasing Segregation Lot 2 and proposed a development agreement with the Lowes wherein Hadaller would obtain partial ownership of the property. (CP 476, 493-496, 657)

- By email dated May 7, 2008 from the Lowes to Hadaller, the Lowes confirmed their purchase of Segregation Lot 2 and rejected Hadaller's proposal. (CP 476, 497-499, 657)

- By email dated May 8, 2008 from Hadaller to the Lowes, Hadaller acknowledged that the Lowes were buying Segregation Lot 2 and that there was no agreement between the Lowes and Hadaller as to the property. Hadaller attached a copy of his *lis pendens* against the property. (CP 477, 500-503, 658)

- By email dated May 8, 2008 from the Lowes to Hadaller, the Lowes expressly confirmed that their purchase and sale agreement with the Fortman Trust for Segregation Lot 2 was executed and finalized, and that there was no agreement between the Lowes and Hadaller as to the property. (CP 477, 504-505, 658)

- By email dated May 9, 2008 from Hadaller to the Lowes, Hadaller again expressly acknowledged that there was no agreement between him and the Lowes regarding Segregation Lot 2. In addition, ***Hadaller specifically informed the Lowes of his intent to commence litigation against them regarding the property.*** (CP 477, 506-507, 658)

In addition, the Court specifically found after trial in Cause No. 09-2-934-0 that "Hadaller was aware of the Lowe's intention to purchase Segregation Lot 2 from the Fortman Trust as of no later than May 1, 2008, but took no steps to object or otherwise contest the sale." (CP 479, 508-557, Findings ¶ 34)

Hadaller admits that the statute of limitations for tortious interference with contractual relations is three years, but argues that it did not begin to run until years after the Lowes agreed to purchase

Segregation Lot 2 from the Fortman Trust based on an intentional or negligent misrepresentation claim against the Lowes. As noted above, however, ***Hadaller never asserted a claim for misrepresentation of any kind, no such claim was considered by the trial court and it is too late to raise it now.*** Likewise, Hadaller's cases related to the timing for discovery of common law fraud are wholly off point. As noted above, there has been no claim of fraud against the Lowes.

Moreover, Hadaller misunderstands the basis for his own tortious interference claim. The cause of action Hadaller asserts is that the Lowes tortiously interfered with a contractual relationship Hadaller had with the Fortman Trust by the act of agreeing to purchase Segregation Lot 2. Thus, the sole question is when Hadaller knew of the Lowes' agreement to purchase Segregation Lot 2 without the Fortman Trust's offer for Hadaller to purchase. On this point, there is no genuine issue of material fact that (1) the act Hadaller claims to be tortious interference—the Lowes' purchase of Segregation Lot 2—was known to Hadaller by no later than May 9, 2008, and (2) to the extent any cause of action existed with respect to the Lowes' action, Hadaller was aware of it by no later than May 9, 2008. Indeed, the fact that Hadaller specifically informed specifically informed the Lowes of his intent to commence litigation against them regarding Segregation Lot 2 confirms that he was aware of any harm and cause of action arising from the Lowes' actions at that time.

There is no dispute that Hadaller waited until May 12, 2011—more than three years later—to file his complaint against the Lowes.

(CP 003-021) Pursuant to RCW 4.16.080(2), this falls outside of the controlling statute of limitation and is time barred and Hadaller's claim for tortious interference was properly dismissed with prejudice.

2. *Hadaller's Claim against the Lowes for Tortious Interference Fails to meet any of the Essential Elements*

An action for tortious interference with a contractual relationship requires: (1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of the relationship or expectancy; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resulting damage." *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997); *Pleas v. Seattle*, 112 Wn.2d 794, 800, 774 P.2d 1158 (1989). For summary judgment purposes, a defendant who can point out to the trial court that the plaintiff lacks competent evidence to support a single essential element of the plaintiff's case is entitled to summary judgment because a complete failure of proof concerning an element necessarily renders all other facts immaterial. *Boyce v. West*, 71 Wn. App. 657, 665, 862 P.2d 592 (1993).

Hadaller lacks competent evidence to support ***each*** of the five elements essential to his claim. If the Court agrees with the Lowes as to any one of the five essential elements, summary judgment and dismissal of Hadaller's claim with prejudice is warranted.

a. No valid contractual relationship

Hadaller admits, and the undisputed evidence confirms, that there was no written agreement between him and the Fortman Trust constituting a right of first refusal, option or other agreement regarding Segregation Lot 2. (CP 479, 560-564) Notwithstanding the overwhelming evidence to the contrary, Hadaller claims that he entered into an oral right of first refusal agreement with Mr. Fortman at the time Hadaller purchased Segregation Lots 1 and 3; indeed, Hadaller testified in his verified complaint under penalty of perjury that the right of first refusal was a condition to his purchase of Segregation Lots 1 and 3:

> Hadaller had an agreement with Fortman as a condition to buying lot 1 of survey instead of lot 2 of survey in 2002 Fortman would assure Hadaller would be able to buy it before any other to complete the development.

(Dk. #2, ¶ 3.10) But the unambiguous language of the Real Estate Purchase and Sale Agreement for Segregation Lots 1 and 3 includes an integration clause that expressly precludes any such agreement:

> Integration: There are no verbal agreements or understandings which modify this Agreement. This Agreement constitutes the full understanding between Buyer and Seller.

(CP 661-662, 665-699) There is no genuine issue of material fact that the parties intended these contracts to be a final expression of their agreement terms; indeed, the presence of the integration clause provides strong evidence that the parties intended the agreement to be fully integrated. *M.A. Mortenson Co. v. Timberline Software Corp.*, 140 Wn.2d 568,

579-80, 998 P.2d 305 (2000). Accordingly, as a matter of law, there could be no right of first refusal and therefore no valid contractual relationship between Hadaller and the Fortman Trust that could have been wrongfully interfered with by the Lowes.

Even if an oral agreement was not barred as a matter of law by the integration clause of the agreements, Hadaller fails to carry his burden of proving the existence of an oral agreement by evidence that is "conclusive, definite, certain, and beyond all legitimate controversy." *Jennings v. D'Hooghe*, 25 Wn.2d 702, 706, 172 P.2d 189 (1946). Particularly where, as here, specific performance of an agreement is sought, the contract must first "be proven by evidence that is clear and unequivocal and which leaves no doubt as to the terms, character, and existence of the contract." *Miller v. McCamish*, 78 Wn.2d 821, 829, 479 P.2d 919 (1971). The Court of Appeals has stated that the overriding concern is directed toward the quantum of proof necessary to remove doubts as to the existence of parties' alleged agreement. *Miller*, 78 Wn.2d at 828-29. Contrary to Hadaller's assertion, Hadaller's mere allegations and conclusory statements arguing for the existence of such a right of first refusal do not establish a genuine issue of material fact precluding summary judgment.

Hadaller asserts multiple meritless arguments in support of the existence of a legally recognizable, oral right of first refusal. First, Hadaller claims that Mr. Fortman has admitted to granting Hadaller a right of first refusal. In fact, Mr. Fortman's testimony is that there was never

any right of first refusal, option or other agreement between the Fortman Trust and Hadaller regarding Segregation Lot 2. (CP 661-663) The Court specifically found after trial in Cause No. 09-2-934-0 that Hadaller provided no evidence other than his own testimony that he had an agreement, right of first refusal or option from the Fortman Trust committing to the sale of Segregation Lot 2 to Hadaller. (CP 479, 508-557) Hadaller admits that in 2005, the Fortman Trust attempted to sell Segregation Lot 2 to Maurice & Cheryl Greer without providing Hadaller a right of first refusal. (CP 007) Even if there ever was such an agreement, Hadaller has admitted that Randy Fuchs' August 21, 2006 offer to purchase Segregation Lot 2 from the Fortman Trust destroyed it. (CP 497, 565-582 ¶¶ 2.5, 2.12) Hadaller has admitted that Mr. Fortman told him that there was no right of first refusal on Segregation Lot 2. (CP 497, 565-582 ¶ 2.12) Further confirming that as of May 2008, when the Lowes purchased Segregation Lot 2 there was no legally recognizable right of first refusal, in 2006, after Hadaller interfered with the sale of Segregation Lot 2 to Randy Fuchs, Mr. Fortman refused to sell Hadaller the property. (CP 661-663) Indeed, Hadaller admits that the Fortman Trust immediately rejected a $200,000 offer made by Hadaller ***on or about March 26, 2008***, little more than a month before the Fortman Trust sold the property to the Lowes. (CP 007-021, ¶ 3.33)

Second, Hadaller claims that real estate agent Robert Kling confirms the existence of a right of first refusal. In fact, Mr. Kling's testimony does nothing of the sort. Rather, the March 26, 2009 declaration

testimony relied upon by Hadaller confirms that while the parties ***negotiated towards*** a lease-option agreement on Segregation Lot 2, they ***never reached any agreement***:

> We further negotiated this sale [of Segregation Lots 1 and 3] to include a lease [for Segregation Lot 2] that was intended to specifically set the terms [of an option to buy the property]. All of these terms were agreed upon prior to entering into the January 2 Addendum amendment agreement. That lease was negotiated by Mr. Fortman however ***Mr. Hadaller's attorney interfered with the terms and Mr. Fortman refused to accept the terms afterwards***.

(CP 744, 750-756, pp. 3-4) (emphasis added) Mr. Kling's testimony therefore confirms the absence of any recognizable contractual relationship between Hadaller and the Fortman Trust regarding the sale of Segregation Lot 2 ***because of Hadaller's own action***. Mr. Kling's admission regarding the failure of the parties to come to an agreement on a right of first refusal was confirmed during the testimony presented by Hadaller during trial on April 26, 2011, wherein Mr. Kling admitted that there was no right of first refusal to purchase Segregation Lot 2 agreed to by the parties as part of Hadaller's purchase of Segregation Lots 1 and 3. (CP 744, 757-764, pp. 3, 5, 8)

Third, Hadaller argues that his claimed oral right of first refusal with the Fortman Trust is taken out of the Statute of Frauds by virtue of part performance. Hadaller is wholly confused on this point. The cases cited in support of his position confirm that part performance is not available to save the alleged (albeit denied by the Fortman Trust) oral

agreement. There was no delivery or any assumption of actual and exclusive possession of Segregation Lot 2 by Hadaller at any time. The fact that Hadaller built a road across Segregation Lot 2 to provide access to Segregation Lot 3 ***on an easement negotiated across Segregation Lot 2*** utterly fails to provide any evidence of a right of first refusal for Hadaller to purchase Segregation Lot 2. There is no allegation that Hadaller ever paid a dime to the Fortman Trust for any part of Segregation Lot 2. Likewise, there is no allegation that Hadaller make any permanent, substantial and valuable improvements on Segregation Lot 2. Again, the only thing that Hadaller did on Segregation Lot 2 was to build a road across a negotiated easement to access Segregation Lot 3—**which Hadaller had to do in order to develop and sell lots carved out of Segregation Lot 3**. Hadaller's arguments provide at best only "circumstantial evidence" of any such agreement. As a matter of law, such "circumstantial evidence" fails to prove the existence of an oral agreement by evidence that is "conclusive, definite, certain, and beyond all legitimate controversy." *Jennings*, 25 Wn.2d at 706.

Finally, perhaps most telling is the fact that in Hadaller's co-pending litigation against Fortman, Cause No. 06-2-1146-3, Hadaller has not alleged breach of a contractual right of first refusal against the Fortman Trust for selling Segregation Lot 2 to the Lowes without first offering it to Hadaller. In Hadaller's July 20, 2011 response to the Fortman Trusts' motion for summary judgment, Hadaller unequivocally states:

> Hadaller's basis for his claim for relief under the doctrine of restitution for unjust enrichment is not predicated upon the loss of the right to own segregation lot 2 [sic] ***the Fortman's attempt to convolute the issue to a breach of contract argument that is not the claim.*** The claim is for the increase in value the Fortman's unjustly received compared to what the value of segregation lot 2 would have been valued at if Hadaller had not completed the work he did while he was working under the assumption of the first right of refusal agreement with the Fortman's.

(CP 745, 765-772, p. 3) (emphasis added) If there had been a valid oral right of first refusal agreement between Hadaller and the Fortman Trust requiring the Fortman Trust to offer the property first to Hadaller, why would Hadaller not be suing the Fortman Trust for breach of contract? The only answer is that Hadaller realizes that there was never a valid contractual relationship. And if there was never a valid contractual relationship between Hadaller and the Fortman trust related to the sale of Segregation Lot 2, it is impossible for the Lowes to tortiously interfere with a nonexistent relationship.

There is no genuine issue of material fact that as of the time the Lowes purchased the property, Hadaller had no legally recognizable contractual relationship with the Fortman Trust to purchase Segregation Lot 2. Hadaller's failure to establish this essential element alone requires dismissal with prejudice of his tortious interference claim.

b. The Lowes had no knowledge of any valid contractual relationship or business expectancy

Because there was no valid contractual relationship or business expectancy between Hadaller and the Fortman Trust related to Segregation

Lot 2, it would be impossible for the Lowes to have knowledge of the same. Mr. Fortman confirms that he never communicated to the Lowes that there was any right of first refusal, option or other legal right possessed by Hadaller to purchase Segregation Lot 2. (CP 478-479, 663-664) The Lowes confirm that they were never informed by Hadaller, Mr. Fortman or anyone regarding Hadaller's claim to a right of first refusal, option or other agreement to purchase Segregation Lot 2 prior to the sale. (CP 474-479, 657-658)

Hadaller asserts in his complaint that the Lowes were aware that the purchase of Segregation Lot 2 by them would end the contractual relationship between Hadaller and the Fortman Trust. But Hadaller must provide more than mere supposition or opinion or conclusory statements on ultimate facts to raise a question of fact sufficient to defeat summary judgment. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988); *Crane & Associates v. Felice*, 74 Wn. App. 769, 778 (1994). In *Crane*, the Court of Appeals affirmed the grant of summary judgment to defendants accused of tortiously interfering with the listing agent commission for the sale of property, concluding that the plaintiff's "bare allegations do not raise a genuine issue of material fact." *Crane*, 74 Wn. App. at 769; *see also Koch v. Mutual of Enumclaw Insurance*, 108 Wn. App. 500, 507, 875 P.2d 705 (2001) (allegations of bad faith and dishonesty rest on nothing more than speculation and conjecture; summary judgment proper because no genuine issue of material fact on element of tortious interference claim). In a

similar fashion, in light of the overwhelming evidence from multiple witnesses, including the testimony from the disinterested seller Mr. Fortman, Hadaller's bare allegations do not raise a genuine issue of material fact.). Moreover, because Hadaller cannot meet the clear and convincing burden required to establish the existence of a valid contractual relationship between Hadaller and the Fortman Trust related to Segregation Lot 2, as a matter of law it is impossible for the Lowes to have knowledge of the same.

Hadaller's attempt to impute statements Hadaller made in some of his countless filings in the more than 400 docket entries in Cause No. 06-2-1146-3 that may have referenced his claim to a right of first refusal is laughable. The Lowes were involved in the lawsuit for less than six months of the nearly five-year old lawsuit. References buried in filings by Hadaller more than a year before the Lowes were brought into the lawsuit and that did not pertain to the claim against them provide no evidence whatsoever of knowledge.

Hadaller's failure to establish this essential element alone requires dismissal with prejudice of his tortious interference claim.

c. The Lowes did not intentionally interfere inducing or causing a breach or termination of the relationship or expectancy

This element requires Hadaller to prove two components: (1) that the Lowes interfered with a contractual relationship or business expectancy between Hadaller and the Fortman Trust, and (2) that the

interference was intentional. As a matter of law Hadaller cannot prove either component.

First, Hadaller cannot prove that the Lowes did anything to interfere with any contract or expectancy between Hadaller and the Fortman Trust. To the contrary, the undisputed evidence from both parties to the transaction confirms that there was no interference. Mr. Fortman, the disinterested seller, has testified as follows:

> I entered into the agreement to sell Segregation Lot 2 to David & Sherry Lowe on May 6, 2008 without the influence of any individual and of my own free will and choice. . . . My decision to sell to the Lowes without contacting or offering to sell the property to Mr. Hadaller was not in any way caused by anything either the Lowes or anyone on their behalf said to me or anyone else. I sold Segregation Lot 2 to the Lowes because they offered to purchase the property at a fair and mutually agreeable price.

(CP 664) Likewise, the Lowes have testified as follows:

> As of [the time we agreed to purchase the property], I had never learned from Hadaller or anyone else that Hadaller claimed to have a right of first refusal, option or any other agreement with the Fortman Trust to purchase Segregation Lot 2. I had no knowledge of or influence over whether Mr. Fortman offered the property to anyone else, including Hadaller, at that time, and absolutely no influence on Mr. Fortman's decision to sell us the property as he did.
>
> . . . .
>
> We never influenced or otherwise had any impact on Mr. Fortman's decision on whom to offer the property to or ultimately to sell the property to use. We merely offered to purchase the property at a fair and mutually agreeable price.

> We were never informed by Hadaller, Mr. Fortman or anyone regarding Hadaller's claim to a right of first refusal, option or other agreement to purchase Segregation Lot 2. To the contrary, we were informed by both Mr. Fortman and Hadaller that the Fortman Trust would never sell it to Hadaller due to the "bad blood" between them. We had no basis to believe that Hadaller would—let alone that he could—enjoin our purchase of the property.

(CP 476-479)

Hadaller was not present at any meetings or discussions between the Fortman Trust and the Lowes. Even assuming that there was a right of first refusal or other agreement between Hadaller and the Fortman Trust to sell Segregation Lot 2, it is impossible for Hadaller to come forward with any evidence whatsoever to contract this testimony or otherwise prove that the Lowes wrongfully influenced Mr. Fortman's decision not to offer the property to Hadaller first, or otherwise interfered in any way with such an agreement.

Barton v. Dahmen, 5 Wn. App. 135, 486 P.2d 295 (1971) is squarely on point and controlling on this issue. Seller Jones entered into an oral listing agreement with salesman Beasley regarding certain property. During the term of the listing agreement Beasley attempted to negotiate a sale between Jones and buyer Dahmen, but Dahmen's offer was rejected. A day after the listing period expired, Jones ran an advertisement listing the property, and thereafter a mutual friend brought Jones and Dahmen together, at which time Jones offered the property to Dahmen at their prior offer. Barton subsequently sued Dahmen for tortious interference with

business expectancy. Identical to this case, the seller Jones provided an affidavit wherein he testified:

> Without the influence of any individual, I decided to handle the sale of the [property] myself, because Beasley had not gotten any results by the deadline I set. My decision to sell directly, and not through a realtor, was not in any way caused by anything either [Dahmen] or anyone on their behalf said to me or anyone else.

Id. at 136. In affirming the trial court's summary judgment in favor of Dahmen, the Court concluded that:

> There are no evidentiary facts posited by plaintiff which, if established, would tend to prove defendants intentionally interfered with plaintiff's business expectancy; nor are there any evidentiary facts presented which would support an inference to that effect. Consequently, the trial court properly granted defendants' motion. *Felsman v. Kessler*, 2 Wn. App. 493 (1970) is distinguishable from the instant case in that here there is an uncontroverted affidavit of the "disinterested person", i.e., Jones.

Id. (citations omitted) In an identical manner, the declaration of Mr. Fortman alone, as the disinterested seller, provides uncontrovertable proof that there was no interference by the Lowes, and is dispositive on this essential element.

Second, for a defendant's conduct to qualify as "intentional" interference as opposed to mere inaction or negligence, the evidence must show that the defendant interfered for the purpose of causing a breach or termination of the contract, not merely as an incidental or indirect result of another act. The breach or termination of the contract need not be the sole purpose or ultimate end of the interferer, but the essential thing is the

purpose to cause the result. *Titus v. Tacoma Smeltermen's Union Local No. 25*, 62 Wn.2d 461, 465, 383 P.2d 504 (1963). In other words, to satisfy this essential element of the claimed tort, Hadaller must prove that the Lowes' purchase of Segregation Lot 2 was expressly for the purpose of destroying a valid contractual relationship or business expectancy. It is not sufficient that the Lowes' purchase had the effect of terminating any relationship between Hadaller and the Fortman Trust unless that was their essential purpose.

Here, the uncontrovertable proof is that the Lowes' "sole purpose and ultimate goal was to purchase the property; even if we had been aware of any agreement between Hadaller and the Fortman Trust, it would not have formed any basis for or significance to our decision to purchase." (CP 478-479, 658) Accordingly, Hadaller is unable as a matter of law to prove this essential element.

d. The Lowes did not interfere for an improper purpose or using improper means

Tortious interference requires interference that is wrongful "by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or profession." *Pleas*, 112 Wn.2d at 804. The alleged wrongful interference in this case is the Lowes' purchase of Segregation Lot 2 from the Fortman Trust. Thus, Hadaller bears the burden of proving that the act by the Lowes of purchasing the property from the Fortman Trust, in and of itself, was done for an improper purpose or using improper means.

Hadaller has made no such assertion, let alone showing, required to prove this essential element. As describe above, the uncontroverted evidence is that the Lowes' "sole purpose and ultimate goal was to purchase the property; even if we had been aware of any agreement between Hadaller and the Fortman Trust, it would not have formed any basis for or significance to our decision to purchase." (CP 478-479, 658) Accordingly, Hadaller is unable as a matter of law to prove that the Lowes' act of purchasing the property was for an improper purpose. Likewise, Hadaller has not provided a shred of legal support for the novel proposition that the offer, acceptance and purchase of property from its fee simply owner is wrongful "by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or profession." *Pleas*, 112 Wn.2d at 804. To the contrary, constitutional law expressly upholds the rights of private citizens to exercise the free alienation of their property.

Hadaller alleges in his complaint that the Lowes used improper means in ending the contractual relationship between Fortman and Hadaller by

> misrepresenting their intent and purpose of obtaining Lot 2 of survey. . . . that they were sincere, they were going to work equitably, divide the property, retain a portion for their personal use and agreed to trade a portion to Plaintiff and pay cash for a lot line adjustment providing a better lake access and to allow an additional water front lot.

(CP 003-021, ¶ 3.38) Hadaller fundamentally misunderstands the requirements of the tortious interference claims.

Assuming there was a contractual relationship between Hadaller and the Fortman Trust, namely, a right of first refusal to purchase the property, the conduct at issue would be what, if anything, the Lowes did to interfere with the decision by the Fortman Trust not to offer Hadaller the first right to purchase the property; this does NOT involve any actions the Lowes may have taken vis-à-vis Hadaller. It was solely the decision of the Fortman Trust whether there was any agreement with Hadaller and whether they would honor such an agreement. Accordingly, as a matter of law, even assuming the Lowes misrepresented their intentions in purchasing the property to Hadaller, the Lowes' actions had absolutely no impact on any contractual relationship between Hadaller and the Fortman Trust.

As an aside, even if there was any significance in the Lowes' interactions with Hadaller as it pertains to the tortious interference claim, and assuming that the Lowes indicated to Hadaller that they would work with Hadaller to come to an arrangement in the future regarding Segregation Lot 2, that would amount at most to an "agreement to agree." An agreement to agree is "an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete." *Keystone Land & Dev. v. Xerox Corp.*, 152 Wn.2d 171, 175-176, 94 P.3d 945 (2004); *Sandeman v. Sayres*, 50 Wn.2d 539, 541-42, 314 P.2d 428 (1957). Agreements to agree are unenforceable in Washington. *Keystone*, 152 Wn.2d at 176. In other words, they do not create enforceable promises. *Metro Park Dist. v. Griffith*,

106 Wn.2d 425, 424, 723 P.2d 1093 (1986). Thus, as a matter of law, even if there was such an agreement to agreement, the Lowes' failure to pursue a further meeting of the minds and a formal agreement could not constitute the wrongful conduct required to support a tortious interference claim.[1]

e. Hadaller cannot establish any damages caused by the Lowes' purchase of Segregation Lot 2

The final essential element requires Hadaller to prove that he has been damaged specifically because of the Lowes' wrongful interference. To show such damage, Hadaller must provide evidence that he could have purchased the property pursuant to a valid agreement with the Fortman Trust. The undisputed evidence demonstrates that as of the time of the Lowes' purchase of Segregation Lot 2, Fortman had vowed never to sell the property to Hadaller. (CP 475, 662-663) Hadaller knew this and admitted the same to the Lowes when encouraging them to consider purchasing the property. (CP 474-475) The Court specifically found after trial in Cause No. 09-2-934-0 that by the time that Hadaller was in a position to try and purchase Segregation Lot 2 from the Fortman Trust, the relations between Hadaller and Mr. Fortman had deteriorated such that the Fortman Trust would not have sold Segregation Lot 2 to Hadaller for any price. (CP 479, 508-557 ¶ 50) Given the admitted utter lack of any prospect that the Fortman Trust would even sell the property to Hadaller,

[1] In point of fact, the weight of credible evidence establishes that the Lowes never entered in to *any* agreement—or any "agreement to agree"—with Hadaller regarding the purchase of Segregation Lot 2 from the Fortman Trust, and that they explicitly rejected any proposal by Hadaller at the time they purchased the property. (CP 474-478, 657-658)

as a matter of law Hadaller could not have been damaged by the Lowes' purchase.

An excellent and highly analogous case is *Fischnaller v. Sumner*, 53 Wn.2d 332, 333 P.2d 636 (1959). Plaintiff optionee held an option to lease property from optionor. Plaintiff sued defendant buyers for tortious interference with the performance of the lease agreement contained in the option. It was the contention of plaintiffs that they exercised their option but that defendants induced the optionor to fail and refuse to give a lease. The evidence demonstrated, however, that plaintiff was never in a position to finance or otherwise go forward with the lease project, notwithstanding opportunities provided by the optionor. Finding in favor of defendant and dismissing plaintiffs' claim, the Washington Supreme Court held that there was no tortious interference by defendants because "it cannot successfully be contended that the defendants induced the optionor to repudiate his contract to the plaintiffs' damage." Rather, "the loss, if any, which the plaintiff's (sic) sustained was due to their own unwillingness to assume the burdens of the contract." *Id.* at 336.

Hadaller admits that he knowingly "allowed the sale [to the Lowes] to close without enjoining it." (CP 003-021, ¶ 3.38) Hadaller admits that he was "aware if [he] allowed Lowe to buy the property [he] prejudiced [his] right of collecting from Fortman for breach of first right of refusal." Hadaller admits he "did not enjoin the sale and stood back." (CP 479, 565-582 ¶ 2.35) If there was any basis for a claim of interference, Hadaller would not have acted in such a manner. Just as in

Fischnaller, there was no intentional interference by the Lowes and any loss sustained by Hadaller as a result of his inability to acquire Segregation Lot 2 was due solely to his own poor decisions in his relationship with Mr. Fortman and his unwillingness or inability, financially or otherwise, to purchase Segregation Lot 2.

Finally, not to be lost is the fact that Hadaller has admitted that Randy Fuchs' August 21, 2006 offer to purchase Segregation Lot 2 from the Fortman Trust destroyed the Fortman/Hadaller right of first refusal agreement. (CP 479, 565-582 ¶¶ 2.5, 2.12) If Fuchs destroyed Hadaller's contractual relationship with the Fortman Trust in 2006, it is impossible for the Lowes to interfere with it in 2008, or to be responsible for any damages resulting from the agreement destroyed by another two years earlier. Hadaller is unable as a matter of law to prove this essential element.

3. Hadaller's Claims against Fuchs Based on his Refusal to Sign the "Amended Covenants"

While as noted above, Hadaller has failed to allege error or substantively argue any claims against Fuchs. In an exercise of caution, Fuchs nevertheless briefly addresses the bases for the trial court's correct decision dismissing the claim on summary judgment. Hadaller's claim against Fuchs must fail based either on the statute of limitation, absolute privilege or *res judicata*.

The statute of limitations for both misrepresentation and tortious interference with contractual relations is three years. RCW 4.16.080;

Blume, 134 Wn.2d at 251; *Rothstein*, 72 Wn. App. at 282-86. There can be no genuine issue of material fact that (1) the act Hadaller claims to be interference or misrepresentation—Fuchs' refusal to sign the "Amended Covenants" document—was known to Hadaller as early as September 2005, and not later than August 28, 2006, the date he recorded the "Amended Covenants" document without Fuchs' signature, and (2) to the extent any cause of action existed with respect to Fuchs' actions, Hadaller was aware of it by no later than August 28, 2006. There is no dispute that Hadaller waited until May 12, 2011—nearly five years later—to file his complaint against Fuchs. (CP 003-021) Pursuant to RCW 4.16.080, this falls outside of the controlling statute of limitation and is time barred, and Hadaller's claims for tortious interference and/or misrepresentation should be dismissed with prejudice.

Alternatively, Hadaller's claims against Fuchs for misrepresentation, disparagement, slander of title and injurious falsehood related to his participation and testimony in legal proceedings involving the "Amended Covenants" document, specifically Fuchs' declaration and trial testimony in Cause No. 09-2-52-1, are absolutely privileged as part of a legal proceeding. Because the defense of absolute privilege is uniquely a question of law, this issue was particularly appropriate for summary disposition as has been the case in numerous prior decisions. *E.g., Bruce v. Byrne-Stevens & Assocs. Eng'Rs*, 113 Wn.2d 123, 126, 776 P.2d 666 (1989) (testimony by expert witness); *Gold Seal Chinchillas v. State*, 69 Wn.2d 828, 833-834, 420 P.2d 698 (1966) (action against state officers);

Johnston v. Schlarb, 7 Wn.2d 528, 110 P.2d 190 (1941) (statements made by county officials); *McClure v. Stretch*, 20 Wn.2d 460, 464-66, 147 P.2d 935 (1944) (allegations by property owner in judicial proceedings).

The absolute privilege defense is applicable to the testimony provided by Fuchs during legal proceedings, and the law on that defense is both well-established and crystal clear. An absolute privilege protects the maker of an otherwise defamatory communication from all liability for libel or slander. *Story v. Shelter Bay Co.*, 52 Wn. App. 334, 338, 760 P.2d 368 (1988). Defamatory communications made by a party or counsel in the course of a judicial proceeding are absolutely privileged if they are pertinent or material to the redress or relief sought. *McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980). A statement is pertinent if it has some relation to the judicial proceedings in which it was used, and has any bearing upon the subject matter of the litigation. *Schlarb*, 7 Wn.2d at 540.

The defense of absolute privilege or immunity avoids all liability. *Spalding v. Vilas*, 161 U.S. 483 (1896); *Briscoe v. LaHue*, 460 U.S. 325, 330-31 (1983); *Bruce*, 113 Wn.2d at 126; *McNeal*, 95 Wn.2d at 267 (allegations made in litigation pleadings alleged to injure the "reputation and peace of mind" of the plaintiff doctors); *Gold Seal*, 69 Wn.2d 828 (press release statement echoing complaint allegations). The defense precludes ***any*** claim irrespective of the theory on which subsequent litigation is based (in other words, regardless whether characterized as

defamation, misrepresentation, disparagement, slander of title, injurious falsehood or outrage). *Bruce,* 113 Wn.2d at 132-33 (citing cases). This absolute privilege or immunity extends to all charges, allegations and averments contained in pleadings addressed to and filed in court, as well as all words spoken in the course of judicial proceedings, including pretrial proceedings, even if they are such as to impute crime to another, or if spoken elsewhere would import malice and be actionable, or even if used by the evil disposed and malignant slanderer and results in great hardship to other parties to the legal proceeding or third parties. *McClure*, 20 Wn.2d at 464-66; *Bruce*, 113 Wn.2d at 126; *Johnston*, 7 Wn.2d 528.

In the same vein, Hadaller's attempts to relitigate the Court's earlier rulings regarding the "Amended Covenants" documents are both irrelevant and wholly unavailing. The sole issue on summary judgment pertaining to Hadaller's remaining claims is whether statements made by Fuchs as testimony in prior legal proceedings are absolutely privileged and therefore cannot, as a matter of law, form the basis of any of Hadaller's claims. It is undisputed that Fuchs' testimony was pertinent or material to the redress or relief sought; indeed, it was necessary to refute Hadaller's assertion of the "Amended Covenants" document in resisting turning over Association documents and funds and control of the Association water system. Accordingly, the absolute privilege defense applies and ***it is irrelevant whether Fuchs' testimony was in fact true or false, was provided innocently or maliciously, or damaged Hadaller!*** *McClure*, 20 Wn.2d at 464-66; *Bruce*, 113 Wn.2d at 126; *Johnston*, 7 Wn.2d 528.

In fact, the trial court believed the testimony of Fuchs regarding the "Amended Covenants" document, held the document invalid and unenforceable, ordered the transfer of Association documents and funds and confirmed Association ownership and control of the water system. In a later proceeding in response to Hadaller's repeated, tiresome rehash of the same arguments during an April 22, 2011 hearing in Cause No. 09-2 934-0 the trial court again unequivocally confirmed:

> I have already made a ruling, when Mr. Fuch testified here under oath in this courtroom and said, "I didn't sign that, that's not my signature," I accepted his testimony. I believed him. That issue is resolved. Period. It is in fact my final ruling, and you are not going to attack that, again, that Mr. Fuch did not sign those purported restrictive covenants. That issue is done. It's not being raised again.

(CP 934, 940-944, p. 8) Of further note to this case is that the trial court went on to add that Hadaller could not sue Fuchs for damages related to his statements, and Hadaller acknowledged the same ***and said he would not be rearguing that issue***:

> Court: You cannot sue Mr. Fuch for damages for that.
>
> Hadaller: I accept, and I agree that you have said that. I don't agree with that issue or it wouldn't be on appeal, but I agree that you said that, and ***I agree that this Court is not going to consider the Amended Covenants. It's dead. It's moot. It's gone. I'm not arguing that.***

(*Id.*, emphasis added) Notwithstanding Hadaller's affirmative assertion in open court, on May 12, 2011, less than three weeks after making his

statement, Hadaller filed the underlying lawsuit asserting the identical claims against Fuchs and attempting yet again to relitigate the same "Amended Covenants" issue previously litigated and rejected on multiple occasions over more than three years and spanning multiple cases in Lewis County.

Based either on the statute of limitations, absolute privilege or under principles of *res judicata*, Hadaller's tortious interference, misrepresentation, disparagement, slander and injurious falsehood claims against Fuchs were properly dismissed with prejudice.

B. HADALLER FAILS TO DEMONSTRATE ANY ABUSE OF DISCRETION BY THE TRIAL COURT IN ITS RECUSAL DECISION OR AWARD OF ATTORNEY'S FEES

Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Thus, even where an appellate court disagrees with a trial court, it may not substitute its judgment for that of the trial court unless the basis for the trial court's ruling is untenable. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007); *Minehart v. Morning Star Boys Ranch*, 156 Wn. App. 457, 463, 232 P.2d 591 (2010).

1. Hadaller Failed to Provide Any Basis for Recusal of Judge Lawler

Recusal lies within the sound discretion of the trial judge, whose decision will not be disturbed absent a clear showing of abuse of that discretion. *Wolfkill Feed & Fertilizer v. Martin*, 103 Wn. App. 836, 840, 14 P.3d 877 (2000); *In re Marriage of Farr*, 87 Wn. App. 177, 188,

940 P.2d 679 (1997). Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct require disqualification of a judge who is biased against a party or whose impartiality may be reasonably questioned. *Wolfkill*, 103 Wn. App. at 841; *State v. Dominguez*, 81 Wn. App. 325, 328, 914 P.2d 141 (1996). The trial court is presumed to perform its functions regularly and properly without bias or prejudice. *Kay Corp. v. Anderson*, 72 Wn.2d 879, 885, 436 P.2d 459 (1967); *Jones v. Halvorson-Berg*, 69 Wn. App. 117, 127, 847 P.2d 945 (1993). A party claiming to the contrary must support the claim; prejudice is not presumed as it is when a party files an affidavit of prejudice under RCW 4.12.050. *Dominguez*, 81 Wn. App. at 328-29.

Hadaller failed to establish that Judge Lawler clearly abused his discretion in denying the motion for recusal. Hadaller argues two bases for his claim that Judge Lawler is prejudiced against him: (1) because the Lowes were at one time represented by an attorney at a law firm where Judge Lawyer formerly practiced, and (2) Hadaller purportedly interviewed Judge Lawler while in private practice to represent him, but ultimately no such representation occurred. Neither basis has any merit whatsoever.

The Lowes were not represented in this case by any member of Judge Lawler's former law firm, nor are they associated with any parties represented by such members. Moreover, even were to the Lowes to be represented by attorneys from Judge Lawler's firm, that would not demonstrate prejudice. The mere fact that a trial judge acted in the past in

a professional legal capacity either for or against a party now before the judge in an unrelated case does not necessarily establish potential bias. Bias must be specifically shown before the judge is disqualified on the basis of previous representation. *Dominguez*, 81 Wn. App. at 329. This situation is much more attenuated, and Hadaller has utterly failed to show any bias.

Hadaller argues that the fact Judge Lawler recused himself from two prior cases must mean that he is prejudiced against Hadaller, or that recusal in this case was warranted. But each of the two prior cases involved very different situations. Specifically, in both cases (Case No. 06-2-1146-3 and No. 09-2-52-1) the defendants were represented by T. Charles Althauser, Esq., a former partner of Judge Lawler while he was in private practice. While recusal was not mandated in such a situation, Judge Lawler, demonstrating his understanding of the potential for an appearance of prejudice, recused himself. In sharp contrast, in this case none of the parties were (or are) represented by Mr. Althauser or anyone from Judge Lawler's prior firm. There is simply no issue as to the appearance of fairness.

Likewise, the fact that Judge Lawyer may have opined on an aspect of an unrelated dispute involving Hadaller does not establish prejudice. A judge is not disqualified as being prejudiced against a party or his interest simply because the judge had previous occasion, as a practicing attorney, to study and give advice based on his interpretation of a point of law involved in the cause presently before him. *Bach v. Sarich*,

74 Wn.2d 575 (1968). Once again, this situation is even more attenuated given that there is no point of law relevant to the present case on which Judge Lawler is claimed to have provided opinion.

Here, the trial court gave assurances that Judge Lawler was not involved in any way with the practice of his former firm or partners and had no recollection of any discussions with Hadaller. (RP 7/1/11 pp. 12-14) Thus, Hadaller's claim of possible bias was purely speculative and the trial court properly denied the motion. In any event, Hadaller fails to meet the high standard required to show abuse of discretion—that the trial court exercised its discretion on untenable grounds or for untenable reasons. *Junker*, 79 Wn.2d at 26.

2. Award of Attorney's Fees Under CR 11 Below

CR 11 provides for the award of sanctions, including reasonable attorney's fees, against offending party or counsel. CR 11 requires that every pleading, motion, and legal memorandum of a party represented by an attorney be dated and signed by at least one attorney of record. The signature constitutes the attorney's (or *pro se* litigant's) certification that he has read the pleading, motion, or legal memorandum, and that to the best of the his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) the pleading is well grounded in fact; (2) it is warranted by existing law; and (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay. CR 11(a). The decision to impose sanctions under CR 11 is vested within

the sound discretion of the trial court. *Tiger Oil Corp. v. Dep't of Licensing*, 88 Wn. App. 925, 946 P.2d 1235 (1997). The court applies an objective standard to determine "whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified." *Id.; Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994); *Eller v. E. Sprague Motors & R.V.'s, Inc.*, 159 Wn. App. 180, 189-190, 244 P.3d 447 (2010).

The trial court relied on a plethora of examples when it made its explicit finding that Hadaller's pleadings are not well grounded in fact, not warranted by existing law, and were interposed for an improper purpose, namely, to harass and cause unnecessary litigation, as demonstrated by the objectively frivolous nature of Hadaller's claims as well as the multiple factual allegations made in his verified complaint that are directly contradicted by prior admissions by Hadaller and/or rulings by the Court. (CP 737-739, 824-827) Given the weight of the evidence relied upon by the trial court, Hadaller fails to demonstrate any abuse of discretion.

RCW 4.84.185 provides that the court having jurisdiction of a civil action may, upon written findings by the judge that "the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense." An award of attorney fees under RCW 4.84.185 lies within the sound discretion of the trial court. An action is frivolous if it

cannot be supported by any rational argument on the law or facts. Unlike with CR 11, a trial court is not required to find an improper purpose under RCW 4.84.185 before awarding fees. It is enough that the action is not supported by any rational argument and is advanced without reasonable cause. *Highland Sch. Dist. No. 203 v. Racy*, 149 Wn. App. 307, 311, 202 P.3d 1024 (2009) (need only find action "frivolous and advanced without reasonable cause;" nothing in the statute requires finding that the action was brought in bad faith or for purposes of delay or harassment); *Koch v*, 108 Wn. App. at 507.

In *Koch*, the Court of Appeals affirmed the trial court's award of attorney's fees and costs to the defendant under RCW 4.84.185. In that case, the plaintiff's allegations of bad faith and dishonesty rested on nothing more than speculation and conjecture, and summary judgment was proper because no genuine issue of material fact existed on the elements of tortious interference.

In a similar fashion, the trial court did not abuse its discretion in concluding that Hadaller's actions were frivolous and advanced without reasonable cause in violation of RCW 4.84.185. Indeed, the fact that Hadaller sought without success to voluntarily abandon his claims for intentional infliction of emotional distress against both the Lowes and Fuchs during the summary judgment hearings, (CP 77, 100 and RP 7/29/11 pp. 7, 19; CP 252 and RP 12/23/11 pp. 12, 22), further confirms that the claims were patentably frivolous and advanced without reasonable

cause, and provides independent justification for the trial court's exercise of its discretion to award both CR 11 and RCW 4.84.185 sanctions.

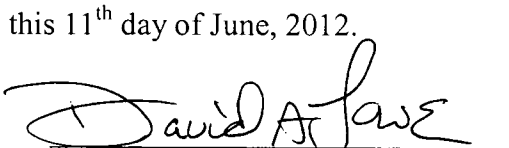
C. AWARD OF ATTORNEY'S FEES ON APPEAL

For the same reasons the Association was entitled to attorney's fees and costs before, namely, pursuant to CR 11 and RCW 4.84.185, the Lowes and Fuchs are entitled to an award of attorney's fees and costs on appeal in this matter. RAP 18.1(a); *Carrara, LLC v. Ron & E Enters., Inc.*, 137 Wn. App. 822, 155 P.3d 161 (2007); *Bushong v. Wilsbach*, 151 Wn. App. 373, 377, 213 P.3d 42 (2009).

V. CONCLUSION

Accordingly, the Lowe and Fuchs respectfully urge the Court to affirm the trial court's actions, and further to award them attorney's fees and costs on appeal, as provided for by RAP 18.1.

RESPECTFULLY SUBMITTED this 11th day of June, 2012.



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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of June, 2011, a true copy of the foregoing was served via U.S. Mail, addressed as follows:

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